

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA)
)
 v.) No. 2:03-cr-85-01
)
GREGORY BARTELS)

MEMORANDUM and ORDER

On August 26, 2004, Gregory Bartels pled guilty to count two of his indictment, which charged him with committing perjury during a deposition conducted by the trustee overseeing his Chapter 7 bankruptcy case, in violation of 18 U.S.C. § 152(2). The Presentence Report calculated Bartels' total offense level at 13, based on a base offense level of 12, plus an enhancement of three levels under U.S.S.G. § 2J1.3(b)(2) for substantial interference with the administration of justice, minus two levels for acceptance of responsibility. The government concurs with this calculation. Bartels challenges the application of the § 2J1.3(b)(2) enhancement.

The charges in the indictment arose from Bartels' fraudulent attempt to exempt from his estate his interest in a ski chalet in Mt. Holly, Vermont. Bartels filed for Chapter 7 bankruptcy protection in Vermont in May 1998. He identified his half-interest in the Mt. Holly chalet as his main asset and valued his share at \$50,000. In the petition Bartels, who resided in the New York metropolitan area, falsely asserted that the Mt. Holly chalet was his domicile, and thus protected from creditors by

Vermont's homestead exemption, pursuant to Vt. Stat. Ann. tit. 27, § 101. The bankruptcy trustee accordingly found no non-exempt assets, and Bartels was discharged from bankruptcy in August 1998.

Bartels' estranged girlfriend contacted the bankruptcy trustee in September 1999 and advised that Bartels had perpetrated a fraud on the bankruptcy court. The trustee moved to reopen Bartels' Chapter 7 case and to revoke his discharge, and subsequently filed an adversary proceeding alleging that he had fraudulently exempted his interest in the Mt. Holly property and that his exemption claim to a life insurance policy should be disallowed as well. Depositions were taken of Bartels and his former girlfriend in July 2000, and Bartels testified that he moved to his Mt. Holly house at the end of March 1998 and lived there until October 1998. This testimony was exposed as a lie. In May 2001 the bankruptcy court approved a settlement of the adversary proceeding, with Bartels paying \$18,290 to the estate for the benefit of his creditors. After the net proceeds were distributed, the bankruptcy case was closed in 2003.

The parties agree that the base offense level applicable to the offense of conviction is 12.¹ At issue is whether Bartels'

¹ The November 1, 1998 edition of the United States Sentencing Commission Guidelines Manual has been used to calculate the applicable guidelines for consideration in determining an appropriate sentence in this case because use of the Guidelines Manual currently in effect would subject the

conduct warrants the application of an enhancement for substantial interference with the administration of justice. U.S.S.G. § 2J1.3(b)(2) provides that "[i]f the perjury . . . resulted in substantial interference with the administration of justice, increase [the base offense level] by 3 levels." U.S.S.G. § 2J1.3(b)(2). Application note 1 to the guideline provides that this three-level increase for substantial interference with the administration of justice "includes . . . the unnecessary expenditure of substantial governmental or court resources." U.S.S.G. § 2J1.3(b)(2) cmt. n.1.

In order to warrant the substantial interference enhancement, the government relies on the expenditure of court resources by the bankruptcy judge and her staff.² The reopened bankruptcy case consumed approximately one hour of courtroom time over several hearings. The parties submitted briefing and the bankruptcy judge ruled on dispositive motions.

"The government need not particularize a specific number of hours expended by government employees." *United States v. Jones*, 900 F.2d 512, 522 (2d Cir. 1990). Nevertheless the expenditure

defendant to a higher total offense level. See U.S.S.G. § 1B1.11.

² The government agrees that the resources expended by the bankruptcy trustee are not governmental resources within the meaning of Application Note 1. See *United States v. Crispo*, 306 F.3d 71, 81 (2d Cir. 2002) (Chapter 7 trustee is officer of the court; is not a government officer or employee).

of governmental or court resources must be shown to be substantial in order to warrant the enhancement. The evidence presented does not support the enhancement. Although this Court does not condone the expenditure of any amount of court resources that result from a fraud perpetrated upon the court, the § 2J1.3(b) (2) enhancement may only be applied if the expenditure is in fact *substantial*.

The cases cited by the government, *United States v. Norris*, 217 F.3d 262 (5th Cir. 2000) and *United States v. Leung*, 360 F.3d 62 (2d Cir. 2004), illustrate the circumstances that have properly been found by district and appellate courts to have constituted substantial interference. They detail far more egregious conduct than that presented here. In *Norris*, the defendant, a former district attorney and partner in a private law firm, found himself in a dispute over business decisions with his partners that culminated in a lawsuit. Norris withdrew \$500,000 in cash from his personal accounts and placed it in a safe deposit box. After his former partners obtained a judgment against him for \$540,000, Norris withdrew the cash from the safe deposit box. In a judgment debtor examination he testified that he had spent it. In involuntary bankruptcy proceedings he testified on at least two occasions that he incinerated the money. The bankruptcy court did not believe Norris and ordered him to turn over the money. Norris refused. The court held

Norris in contempt and ordered him incarcerated. Every month the court demanded to know the location of the money. Every month Norris claimed that he burned the money. Norris remained incarcerated for more than a year. *Norris*, 217 F.3d at 264-65.

All in all, Norris was found to have engaged in a significant and lengthy campaign of obstruction before the bankruptcy court. The Fifth Circuit also emphasized that substantial interference could be inferred under these circumstances, because Norris was the only source of knowledge of the location of the money. *Id.* at 274; *see also Jones*, 900 F.2d at 522 (when defendant is only known source of information, substantial interference with administration of justice may be inferred).

In *Leung*, the defendant, charged with two counts of passport fraud, concocted an elaborate scheme to fake his own death. Posing as his brother, he reported his death to his attorney, and then went to great lengths to obtain documentation of his fictitious employment at the brokerage firm of Cantor Fitzgerald to set up a claim that he had died in the attacks on the World Trade Center. Then he jumped bail. It took two United States Deputy Marshals three to four hours a day for a month to track him down, during which time they interviewed dozens of witnesses and obtained hundreds of documents. Various teams of Deputy Marshals conducted surveillance on eight different days. *Leung*,

360 F.3d at 65-66. According to the district court, "[t]his is not the ordinary bail-jumping case, for lots of reasons." *Id.* at 67.

Bartels' offense, although serious, does not approach the expenditure of resources that justified enhancements in *Norris* and *Leung*. He lied at a deposition; the bankruptcy trustee was forced to commence an adversary proceeding to get at the truth; the bankruptcy court conducted a modest number of short hearings on the issues; after several months the parties reached a settlement and the case was closed. The information concerning Bartels' residence in Vermont was available from other sources. Furthermore, the bankruptcy trustee commenced the adversary proceeding on two grounds, only one of which involved Bartels' perjury. Granting that the residency issue was the primary impetus for the re-opened bankruptcy proceedings, the fact that it was not the sole impetus further weakens the claim that Bartels' perjury caused the unnecessary expenditure of substantial court resources.

The information provided at sentencing does not demonstrate that Bartels' perjury resulted in substantial interference with the administration of justice; accordingly the Court will not impose a three-level increase to Bartels' base offense level.

Dated at Burlington, in the District of Vermont, this 6th
day of April, 2006.

/s/ William K. Sessions III
William K. Sessions III
Chief Judge
U.S. District Court